

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE NEBRASKA  
PUBLIC SERVICE COMMISSION, ON  
ITS OWN MOTION, SEEKING TO  
INVESTIGATE QWEST'S SWITCHED  
ACCESS CHARGE RATES

DOCKET NO. C-3345/NUSF-42/PI-93

**QWEST CORPORATION'S BRIEF REGARDING COMPLIANCE WITH  
COMMISSION RULES AND REGULATIONS**

Qwest Corporation, ("Qwest"), by and through its counsel, supplies the following brief on the question framed by the Commission's Hearing Officer Order dated May 12, 2005:

**Whether the Access Tariff Amendment filed by Qwest Corporation with the Nebraska Public Service Commission on December 20, 2004, was unlawfully implemented in violation of Commission orders or rules and regulations.**

***Introduction***

The question posed by the May 12 Order finds its genesis in a faulty, unfair premise. No statute gives the Commission jurisdiction to regulate access rates until after any rate is imposed. The Commission recognized this in Docket C-1628, Progression Order No. 1 (September 15, 1997), observing that Nebraska's statutory deregulation scheme "restricts the situations and manner in which the PSC may exercise its regulatory power over rates of telecommunications companies," and finally concluding that "[p]ursuant to current statutory provisions, the Commission is authorized to establish access charge rates for a local exchange carrier only in the event it is presented with an application by an 'affected carrier' pursuant to the procedure provided

in the first four sentences of sec. 75-609(2) [now codified at NEB. REV. STAT. § 86-140].”

Pursuant to NEB. REV. STAT. § 86-140, the Commission simply lacks jurisdiction to dictate access rates in advance. Thus, Qwest’s imposition of the new access rates could not possibly violate any valid order of the Commission.

Moreover, Qwest consistently told the Commission long before the adoption of the final orders in NUSF-26 that reductions in its support would cause pressure to increase access rates.<sup>1</sup> The Commission responded to these concerns by building into its new distribution methodology an “Access Adder Adjustment” that accounts for differences between companies’ access rates and revenues, but did not prohibit Qwest from increasing its access rates.

Regardless, Qwest has not violated any order, whether valid or not, in connection with the recent increases in its access rates. Qwest reduced its access rates dramatically in response to the Commission’s guidance in Dockets C-1628 and derivative dockets like NUSF-17 indicating that “[g]enerally, the state access charge structure should approximate the interstate access charge structure. . . .” Docket C-1628, Findings and Conclusions (January 13, 1999), at 5. For a time, the Commission maintained the *quid pro quo* set forth in that Order, distributing NUSF support to Qwest so that its access rate reductions were revenue neutral.

At the final hearing of this matter, the evidence will demonstrate that Qwest stands nearly alone as a carrier that actually implemented the policies announced in C-1628. Indeed, Qwest will show that even its new, increased access rates are lower than

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<sup>1</sup> See, e.g., Pre-filed Testimony of Rex Fisher, June 6, 2003, p. 9; Hearing Testimony of Rex Fisher, June 19, 2003, Transcript pp. 218, 230-232; Qwest’s Comments to Progression Order No. 5, July 28, 2004.

most other carriers in Nebraska – even among those that currently receive NUSF support.

With the adoption of the permanent funding mechanism in NUSF-26, the Commission abandoned C-1628 and NUSF-17, instead implementing a new funding methodology. As a result, those orders no longer apply, and the Commission cannot enforce only parts of those orders. It would be manifestly unfair and illegal for the Commission to withdraw from its obligations set forth in C-1628 and NUSF-17 while attempting to enforce any obligations on Qwest or other carriers that lost support as a result of NUSF-26.

The directives in docket C-1628 to reduce access charges had three characteristics important for the Commission's consideration here:

***(1) The order was tied to the Nebraska Universal Service Fund ("NUSF"), not a general finding of whether access rates were "fair and reasonable" within the meaning of what is now § 86-140(1). Thus, any regulation of access rates from that docket was at most indirect.***

***(2) The order tied reductions in access to dollar-for-dollar distributions from the NUSF, so that reductions in access would be revenue neutral.***

***(3) The order was temporary and "transitional" in nature, such that its scheme applied only until a permanent NUSF funding mechanism was established. That permanent funding mechanism was established in Docket NUSF-26 on November 3, 2004.***

## **Argument**

### **1. The Limited Scope of Rate Regulation.**

The Commission's rate regulation jurisdiction is limited by statute, and has been since 1987. Pursuant to Neb. Rev. Stat. § 86-123(2), "[t]he commission may regulate telecommunications company rates pursuant to sections 86-139 to 86-157." This is the

only rate regulation authority given to the Commission by the Legislature. Section 86-139 confirms the limited scope of Commission jurisdiction to regulate rates:

Except as provided in the Nebraska Telecommunications Regulation Act, **telecommunications companies shall not be subject to rate regulation by the commission** and shall not be subject to provisions as to rates and charges prescribed in sections 75-101 to 75-158.

The Commission agreed that “[t]he Commission’s ability to set rates and prices for service provided by regulated entities generally is . . . limited by statute,” referring in a footnote to the limiting provisions of § 86-139, as recently as last September, in its ruling closing the docket in *In the Matter of the Petition of Chase 3000, Inc., et al.*, Docket No. C-3233/PI-84, Order Closing Investigation (September 21, 2004). Thus, the only authority the Commission has to implement any regulation of Qwest’s rates comes from Neb. Rev. Stat. §§ 86-139 through 86-157.

The relevant statutes here are Neb. Rev. Stat. § 86-140 and § 86-144. On December 20, 2004, Qwest filed a tariff increasing its switched access charges, pursuant to § 86-144, which provides that in an exchange in which local competition does not exist, telecommunications companies shall file rate lists which, for all telecommunications services except for basic local exchange rates, shall be effective after ten days’ notice to the Commission.”<sup>2</sup> Accordingly, Qwest’s new rates took effect on January 1, 2004.

Switched access rates are also governed by § 86-140. That section provides explicit procedures for “affected telecommunications company[ies]” and the Commission to follow in order to resolve disputes and review or change an access charge that has

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<sup>2</sup> Qwest does not concede that local competition does not exist throughout Nebraska. However, Qwest has not yet filed a request to have any exchanges in Nebraska declared competitive, as required by Neb. Rev. Stat. § 86-143(2) before Qwest could take advantage of the procedures for implementing rate changes outlined in § 86-143.

been “imposed.” In addition, In 1998, the registered voters of the State of Nebraska, by initiative submitted to the Secretary of State of Nebraska, proposed to amend § 86-140, by rewriting (2), and adding (3), the stated purpose being to develop competition in the telephone access service marketplace by requiring that: (1) the Nebraska public service commission set access charges imposed by local telephone carriers for access to local telephone networks based upon forward-looking economic costs without implicit subsidies; (2) average, aggregate prices charged to consumers for long distance service within the state reflect the reduction in access charges applicable to that service; and (3) local exchange access be cost-based, competitively neutral, and non-discriminatory. The voters rejected those changes to the section, further confirming the limited nature of the Commission’s jurisdiction to regulate access rates beyond the terms provided by the legislature. Put simply, the Commission should not act where the legislature failed or refused to provide for the interim relief sought by the Department.

**2. Access Reductions Made In Response to C-1628 and NUSF-17 Were Made Voluntarily as Part of Nebraska’s Universal Service Fund.**

In Dockets C-1628 and derivative dockets like NUSF-17, the Commission requested that carriers reduce their access rates, and promised to make up the revenue lost by those reductions by distributions from the NUSF. No carrier was required to reduce its access rates. Rather, the order was limited to those carriers who voluntarily (a) participated in the NUSF program, and (b) sought to obtain NUSF distributions under the transition plan. Qwest was among these carriers, and drastically reduced its access rates, of its own volition. The Commission did not require the access reductions, but because NUSF distributions were to be revenue neutral, Qwest would not have been

eligible for NUSF distributions under C-1628 or NUSF-17 unless it reduced its access revenue.

Thus, the effect of C-1628 and NUSF-17 was to reward access voluntary revenue reductions with revenue-neutral NUSF support matching those reductions (to the point where all implicit subsidies were removed), during the transitional period until NUSF-26 was completed. The Commission could not, and did not, go further than this under what is now § 86-140. The Commission did not order CLECs like AT&T, MCI, or Cox to reduce their access charges, unless they wanted to receive NUSF distributions.

**3. Access Revenue Reductions and NUSF Support Were Deemed “Inextricably Inter-Related” in Docket C-1628, But Later Abandoned in Docket NUSF-26.**

Qwest anticipates that other parties will argue that the Commission’s orders in C-1628 and NUSF-17 prevent Qwest from increasing its access rates. C-1628 was overruled, however, by NUSF-26. In the first paragraph of the final Findings and Conclusions in NUSF-26, the Commission stated that the purpose of NUSF-26 was to “revise the universal service funding mechanism established in C-1628/NUSF.” In “revising” C-1628, NUSF-26 has now supplanted and replaced C-1628, and C-1628 can no longer be considered binding on anyone. The Commission expressly abandoned C-1628 and NUSF-17 when it concluded that it would no longer provide support based on access revenue reductions, but rather on costs of providing basic local service.

Now, some parties will argue that even though the Commission has abandoned parts of C-1628 and NUSF-17 – notably, the parts binding the Commission to provide revenue-neutral support for access revenue reductions – other parts of those orders

nevertheless remain intact. The Commission cannot equitably enforce those orders on a piecemeal basis.

Qwest cooperated with the Commission in reasonable reliance on the Commission's orders in C-1628 and NUSF-17, and reduced its access revenue. When the Commission changed its method of support, with the result that Qwest's support will decrease by tens of millions of dollars per year, the access reductions that Qwest made in NUSF-17 lost their character as revenue-neutral. With this decision, the Commission simply made a policy choice to minimize (but not eliminate, as discussed below) the connection between access rates and universal service. Qwest argued strongly with the Commission to retain the connection between access reductions and universal service distributions, but the Commission rejected those arguments. In so doing, the Commission abandoned the following conclusions and orders made in connection with dockets C-1628 and NUSF-17 (emphasis added in all quotes):

- ***Intrastate access charges and the establishment of a NEUSF are inextricably inter-related.***<sup>3</sup>
- Due to the opening of ILEC markets to competition, this subsidization practice is no longer desirable. ***As a result, the rates for services that provide implicit support should be reduced. The lost support may, over a reasonable period of time, be replaced . . . by state and federal universal service funds.***<sup>4</sup>
- As a result, the rates for services priced above costs should be reduced to reflect actual costs. ***The lost subsidies should, over a reasonable period of time, be replaced***  
(a) through increases in rates for services priced below cost and  
(b) from state and federal universal service funds.

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<sup>3</sup> C-1628, Preliminary Findings and Conclusions, September 15, 1997, p. 2.

<sup>4</sup> C-1628, Findings and Conclusions, January 13, 1999, p. 2.

- During the transition periods, an eligible carrier's NUSF support shall equal the implicit support it has removed through changes in access charges and basic local service rate reductions . . . .<sup>5</sup>
- Based on the evidence adduced at the hearing and upon consideration of the CALLS Order, the Commission finds that there is adequate reason to believe that implicit subsidies exist in Qwest's intrastate switched access charges. ***The Commission further believes that the reductions in access should be recovered through the NUSF.***<sup>6</sup>
- [W]e conclude that permitting the support to be recovered explicitly through the NUSF is consistent with the structure and policies set forth in the Telecommunication Act of 1996, the NUSF Act and with Commission orders entered in C-1628. In so finding, ***the Commission concludes that it is appropriate to offset the requested \$6.1 million of access charge reductions with explicit support from the NUSF.***<sup>7</sup>

That the Commission abandoned these conclusions was further confirmed with the closing of Docket NUSF-19, which sought comment on toll reductions and access reduction flow-through, because the Commission believed that the final orders in NUSF-26 made the issues in Docket NUSF-19 moot.<sup>8</sup> The Commission could not have reached the conclusion that the issues in that docket were moot unless the orders from Docket C-1628 and its derivative dockets, including NUSF-17, were supplanted, or in the Commission's words "revised" by NUSF-26.

In this docket, despite these rulings in NUSF-26 and NUSF-19, certain parties argue that the Commission should continue to enforce C-1628 and its derivative dockets. But the Commission cannot enforce parts of either NUSF-17 or C-1628 without enforcing the remainder, including the portions that award NUSF support to

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<sup>5</sup> *Id.*, p. 7.

<sup>6</sup> NUSF-17, Findings and Conclusions, September 24, 2002, ¶ 18.

<sup>7</sup> *Id.*, ¶ 20.

<sup>8</sup> NUSF-19, Order Closing Docket, December 1, 2004.



Qwest explicitly tied to its access reductions. The Commission has already made its choice to largely abandon these orders, despite Qwest's arguments to the contrary.

The Commission did not entirely abandon any connection between access revenue and NUSF support, however. In NUSF-26, the Commission expressly included as part of the distribution methodology an "Access Adder Adjustment."<sup>9</sup> That adjustment is described as follows (footnotes omitted):

In the C-1628 Order, the Commission determined services, such as access service, are priced at levels that support residential service. The rates for these services that provide implicit support were to be reduced. However, reduction methods differed for rural and non-rural companies. Additionally, the initial access rates, prior to any reductions, differed significantly by company. Thus, the access rates that resulted from the Commission's rate rebalancing edict differ by company.

The Access Adder-Adjustment accounts for the differences, due to differing access service rates, in monthly revenues collected from an average residential access line. The Access Adder-Adjustment is company specific.

Thus, the Commission anticipated and now addresses access revenue differences among companies as part of the calculation of NUSF distributions. Qwest's new access rates, and the revenue derived from those rates, should be calculated as part of that Access Adder Adjustment.

## ***Conclusion***

The Commission has only limited rate-regulation jurisdiction under Nebraska's statutory scheme. Pursuant to § 86-144, any company may implement an access rate change which becomes effective ten days after it is filed. Later, after the new charges are imposed, § 86-140 permits the Commission or any affected carrier to challenge the new rates, and the Commission can establish a "fair and reasonable" rate after a

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<sup>9</sup> NUSF-26, Progression Order No. 5, Appendix A, p. 8.

hearing takes place. The Commission cannot regulate these charges before they are filed.

The authority given the Commission to establish the NUSF gives the Commission the ability to indirectly incentivize carriers who seek NUSF distributions, which the Commission did in Docket C-1628 and its derivative dockets like NUSF-17, when it ordered that NUSF support would be given dollar-for-dollar for access revenue reductions until all subsidies were removed. The arguments of Alltel and MCI illogically require the Commission to conclude that those orders no longer bind the Commission, but still bind Qwest. However, when the Commission abandoned parts of its orders in those dockets, those orders can no longer be binding on Qwest. Moreover, no Commission regulation or rule limits any carrier's ability to set access rates consistent with Nebraska law. Thus, Qwest cannot be said to have violated any existing Commission order, rule, or regulation in connection with its access rate increase.

The Commission may still continue to evaluate whether Qwest's new access rates are "fair and reasonable," pursuant to § 86-140, and should include Qwest's access revenue in its Access Adder Adjustment pursuant to NUSF-26. Qwest is confident, however, that when compared to the rates charged by other carriers for essentially the same services, the evidence will show that Qwest's rates are eminently fair and reasonable.

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Respectfully submitted,

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